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No. 83-2130

In the Supreme Court of the United States

OCTOBER TERM, 1984

RENE G. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's enhanced sentence imposed for conspiring to possess methaqualone with intent to distribute was lawful.

2. Whether the government's failure to reveal a bargain with a co-defendant denied petitioner his Confrontation Clause rights where petitioner declined to call the co-defendant as a witness and inquire about the bargain.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B17) is reported at 727 F.2d 353.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1984, and a petition for rehearing was denied on March 28, 1984 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiring to possess methaqualone with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to eight years' imprisonment, an enhanced sentence that was

based on a prior narcotics conviction. The court of appeals affirmed (Pet. App. B1-B17).[1]

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. B2-B6). It showed that in October 1982, DEA Agent William Martin posed as a supplier of methaqualone after an informant related that Jose Jimenez and Patrick Treacy wanted to buy the drug. At an October 5 meeting near McAllen, Texas, Treacy and Jimenez agreed to buy 400,000 Mandrax (methaqualone) pills for $340,000, and Treacy gave Martin a $10,000 down payment in return for a sample of 10 pills. On October 19, Treacy gave Martin one ounce of cocaine worth $2,500, and Martin gave Treacy 10 more sample pills. Treacy told Martin that someone owed him money and that he would show the sample pills to his "money people" and then recontact Martin.

Treacy left Martin and drove to Weslaco, Texas, where he stopped at petitioner's home for an hour and a half. He then called Martin and agreed to the transaction arranged earlier that day. The next day, DEA agents observed Treacy and petitioner leave Treacy's hotel room and drive to a mall where petitioner got into a Cadillac. Both men then drove back to Treacy's motel in separate vehicles. When petitioner got out of the Cadillac, he was carrying a brown paper bag bearing a "Carl's Food-N-Stuff" logo. Petitioner carried the bag into an enclosure that was already occupied by Treacy. Treacy left the enclosure carrying the bag and went to meet Martin.

At Treacy's subsequent meeting with Martin, Treacy said that the money for the pills was under the passenger seat in his van. Martin got into the van and pulled out a "Carl's

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[1]The court of appeals concluded that the evidence supporting the conviction of petitioner's co-defendant, Conrad John Blessing, was insufficient, and it reversed Blessing's conviction (Pet. App. B10-B11).

Food-N-Stuff" bag filled with money. Treacy was then arrested, and petitioner was arrested a short time thereafter.

2. On appeal, petitioner contended, inter alia, that his eight-year enhanced sentence, imposed pursuant to 21 U.S.C. 841(b)(1)(B), was unlawful. Petitioner argued that the district court could have imposed only the five-year maximum sentence allowable for the substantive offense of possessing methaqualone with intent to distribute it (21 U.S.C. 841) and that Section 841's enhancement provision (21 U.S.C. 841(b)(1)(B)) does not apply when the prior conviction relied upon for enhancement is a conspiracy conviction under Section 846. The court of appeals disagreed, concluding that *Bifulco* v. *United States*, 447 U.S. 381 (1980), upon which petitioner relied, was distinguishable. In *Bifulco*, this Court held that the term "imprisonment," as used in the conspiracy statute, 21 U.S.C. 846, did not encompass the special parole provision set forth in the penalty section, 21 U.S.C. 841. Here, by contrast, the court of appeals concluded that there is no functional distinction between extended incarceration, as authorized by Section 841, and the term "imprisonment," as used in Section 846. Pet. App. B13-B14.

Petitioner also claimed that he was denied his right to confront Treacy because the government failed to reveal the existence of a plea bargain with Treacy that allegedly required him to remain silent. The court of appeals rejected this argument, noting that Treacy was available to petitioner as a witness, but petitioner never called him or attempted to demonstrate that he would not testify if called. Pet. App. B14-B16.

ARGUMENT

1. Although he acknowledges (Pet. 8) that he is raising an issue of first impression and therefore cites no authority for his position, petitioner argues that the "rule of lenity"

applied in *Bifulco* should be applied here to prevent a court from imposing an enhanced term of imprisonment under 21 U.SC. 841 for a violation of the conspiracy statute, 21 U.S.C. 846.[2] Petitioner's argument is without merit.

In *Bifulco*, this Court recognized that under Section 846 conspiracy is punishable by "imprisonment or fine or both," but that the punishment may not exceed the maximum punishment prescribed for a violation of the substantive target offense.[3] Because the word "imprisonment" as used in Section 846 did not clearly encompass a special parole term as described in the penalty provisions of the target offense, Section 841, this Court applied the rule of lenity and held that special parole terms could not be imposed in conspiracy cases. Here, by contrast, there is no statutory ambiguity calling for application of the rule of lenity. Section 846 clearly prescribes a term of *imprisonment* that may not exceed the term of imprisonment allowed for the target offense. Section 841, the offense underlying the conspiracy, permits an enhanced term of *imprisonment* if the defendant has a prior narcotics conviction. The court of appeals thus correctly concluded (Pet. App. B14) that there is no "functional distinction" between extended incarceration and the imprisonment expressly authorized under Section 846.

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[2]Petitioner no longer appears to argue, as he did below, that the enhanced sentence was improper because his prior conviction, like the instant one, was a conspiracy conviction. Instead, he simply argues that no enhanced sentence may be imposed for a conspiracy conviction, without regard to whether the prior conviction was for the "target" offense or for conspiring to violate the "target" statute.

[3]21 U.S.C. 846 provides in pertinent part:

> Any person who * * * conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy.

2. Petitioner next contends (Pet. 14-18) that the trial court's refusal to order the government to disclose a plea agreement that it might have made with Treacy denied him his confrontation rights. The court of appeals correctly rejected petitioner's claim, and its decision does not warrant further review.

Contrary to petitioner's contention, he simply was not denied his right to confront Treacy. The district court declined to order revelation of any agreement between Treacy and the government unless Treacy was called as a witness. The trial court also specifically ruled that Treacy was available as a witness (Tr. 236).[4] Petitioner nonetheless failed to call Treacy and question him regarding any plea agreement that might have precluded his testimony. Having failed to avail himself of the opportunity to question Treacy, petitioner cannot now complain that he was denied his Confrontation Clause rights. See *United States* v. *Fernandez-Roque*, 703 F.2d 808, 813 (5th Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

NOVEMBER 1984

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[4]The prosecution made no "deal" with Treacy that affected his availability as a defense witness. Rather, the prosecution agreed only that Treacy would not be called as a prosecution witness. See Br. for Appellee 15.